

## **Wetlands Appeal Streamlining Regulations**

### **PREAMBLE**

Delays in wetland permit appeals are costly to applicants, the Department and others. Many wetland permit appeals are resolved within 6 months through settlement and prescreening conferences. Many take more than a year to resolve. Governor Patrick directed MassDEP to reform the wetlands appeals process to ensure more timely action, without reducing the level of environmental protection. The comprehensive reform contained in the 2007 regulations is intended to accomplish this goal.

The new wetlands permit appeal process will continue to include prescreening, prefiled testimony and prior participation. These tools have worked to make the appeals process more efficient. The new regulations build upon these tools and to ensure a fair process, require parties to present their evidence early in the proceedings, and eliminate unnecessary delay in the hearing process.

Under these regulations, an applicant who filed the notice of intent, an aggrieved person, a ten resident group, and a conservation commission may appeal. While not statutorily required, the new regulations continue to allow Conservation Commissions to initiate appeals because of the important role they play in the Wetlands Protection Act, and because they have a stake in the outcome of an appeal that started with their decision. The regulations also allow ten residents to initiate appeals, extending the statutory right such groups have to request a superceding order of conditions. Ten citizens or a person substantially affected can also intervene in an appeal early in the process.

Wetland permit appeals will continue to be filed at MassDEP and initially addressed at a prescreening conference. The Presiding Officer will issue a scheduling order upon receipt of an appeal that will schedule the prescreening within 30 days and the hearing within 120 days. Prescreenings evaluate appeals to determine whether they are amenable to settlement, mediation or dismissal. In the event that a case is not resolved during prescreening, the Presiding Officer will also identify the issues to be decided at hearing. Between these time frames, first the petitioner and then the responding parties must file their "pre-filed" direct and rebuttal testimony. Intervenors must also meet the regulatory deadlines for filing their testimony. To ensure that the process is fair for parties who are not the proponent of a project, the new regulations mandate that the applicant provide information about the project and allow a site visit, at an early stage in the process.

The Presiding Officer will conduct an evidentiary hearing at MassDEP but will retain the option of transferring cases to DALA on a case-by-case basis where he or she determines that the timely resolution of a matter will benefit from DALA's assistance. A Final Decision is scheduled to be issued within six months, and not more than seven months if a major or complex appeal cannot be resolved within the six-month schedule.

This revision focuses on prospective wetlands permit appeals. Cases that are in the appeal process prior to October 31, 2007 will continue under the 2004 wetland and appeal regulations. These changes will be evaluated after 1 year, adjustments will be made if necessary, and consideration will be given to extending this process to other appeals.

## **310 CMR 10.04**

### **1. Definitions/Terms**

Direct Case—the evidence that a party seeks to introduce in support of its position, as well as any legal argument the party wishes to provide. The Direct Case may include, but is not limited to, statements under oath by lay witnesses and expert witnesses, technical reports, studies, memoranda, maps, plans, and other information that a party seeks to have the Presiding Officer review as part of the adjudicatory proceeding.

Landowner—the owner of record of land or an interest in land that is the subject of a Reviewable Decision.

Major or Complex – means an appeal of a Reviewable Decision issued for work in a resource area that will be so designated due to the complexity or novelty of the issues, the magnitude of the project, the potential for environmental harm or benefit, significant public interest or public financing or other relevant consideration, as determined by the Commissioner or a Presiding Officer.

Reviewable Decision—A MassDEP decision that is a superseding order of conditions or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance.

## **310 CMR 10.05(7)(j)**

**1. Timely Filings.** Papers required or permitted to be filed under this section must be filed with the Department, at the address designated in the Reviewable Decision, within the timelines specified herein. Papers shall be considered filed as set forth in 310 CMR 1.01(3).

### **2. Appeal Notice.**

- a. Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any 10 residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding, may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision.

“Previously participating in the permit proceeding” means the submission of written information to the conservation commission prior to close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision. The Appeal Notice must be filed with the Department with a copy sent to the appropriate regional Department office by certified mail or hand delivered within ten days after the date of issuance of the Reviewable Decision, and a copy thereof must at the same time be sent by certified mail or hand delivered to the conservation commission (if not filed by the conservation commission) and to the applicant (if not filed by the applicant). The Appeal Notice shall also be served by certified mail or hand delivered on any person that requested the action by the Department that resulted in the Reviewable Decision. In the event that the entity that requested the action is a ten resident group, the Appeal Notice shall be served on the designated representative of the ten resident group, whose name and contact information shall be included in the Reviewable Decision. Any party listed in this paragraph that fails to timely file an Appeal Notice pursuant to this section, shall be deemed to have waived its right to appeal the Reviewable Decision.

- b. The Appeal Notice shall include:

- i. the Petitioner's complete name, address, phone number, fax number and email address and, if represented, counsel's name, address, phone number, fax number and email address and if a ten resident group, the same information for the group's designated representative;
- ii. the Department's wetlands file number, if applicable, the name of applicant and address of the project.
- iii. if filed by an aggrieved person, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a) and sufficient written facts to demonstrate status as a person aggrieved;

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- iv. if filed by a ten resident group, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a);
  - v. a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, section 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision;
  - vi. a copy of the Reviewable Decision appealed and a copy of the underlying Conservation Commission decision if the Reviewable Decision affirms the Conservation Commission decision; and
  - vii. if asserting that a matter is Major or Complex, a statement requesting that the Presiding Officer make a designation of Major or Complex, with specific reasons supporting the request.
- c. An Appeal Notice that does not contain all of the information required in 1(b) above may be dismissed.
- d. Within five business days of receipt of a written request by any potential party, the applicant shall make all documents submitted to the Department in support of the Reviewable Decision, including but not limited to the notice of intent, plan of record, or other information, available to any person who states that they intend to appeal or intervene. In the case of a ten resident group, or a group intervening pursuant to M.G.L. c. 30A, the applicant need only make one copy available to the group's designated representative.
- e. Within five days of the receipt by the applicant and/or property owner of a written request by any person who has filed an appeal or intervened, and/or such person's consultants, attorneys, or other representatives, shall be allowed to visit the site with the property owner, upon reasonable conditions of the applicant and/or property owner. The purpose of a site visit shall be related solely to the Reviewable Decision under appeal and shall be specifically identified by the requesting party. The person requesting the site visit may request a later date for the site visit, which shall be reasonably accommodated by the applicant and/or property owner.
- f. The Department, the conservation commission, the petitioner, the applicant, and any interveners pursuant to 310 CMR 10.05(7)(j) shall be deemed to be parties to the proceeding and are entitled to service of all documents filed in the proceeding, and shall be included in a certificate of service to accompany all filings in accordance with 310 CMR 1.01(4)(f).
- g. No work shall be undertaken until all administrative appeal periods from a Reviewable Decision have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.

- h. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)3.b. above, *sua sponte*, and provide a prompt ruling to the parties, or if in response to a motion within ten (10) days of the filing of such motion.

### **3. Petitioner's Direct Case.**

- a. A Party who has timely filed an Appeal Notice must file with the Department and serve a copy on all parties its Direct Case no later than forty-five days after the Prescreening Conference.
- b. The Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.
- c. In its Direct Case, the Petitioner must establish the legal and factual basis for its position on the issues identified by the Presiding Officer in the pre-screening report. Failure to do so will result in a waiver of Petitioner's Direct Case for that issue. In addition, the Direct Case at a minimum shall include:
  - i. a description of the subject matter of the Reviewable Decision;
  - ii. credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).

**4. Respondents' Direct Case.** A party that seeks to support or defend the Reviewable Decision shall file and serve on all parties a Direct Case within thirty days of the filing of the Petitioner's Direct Case. A responding party shall be deemed to be a "Respondent."

- a. Response Content: The response shall at a minimum include:
  - i. A rebuttal to the Petitioner's Direct Case setting forth the legal and factual basis supporting the Reviewable Decision, including relevant statutory and regulatory citations and evidentiary support consisting of credible evidence from a competent source;
  - ii. any affirmative defenses and evidentiary support for them, including but not limited to the defense of lack of standing; and
  - iii. if asserting that a matter is Major or Complex, a statement requesting that the Presiding Office make designation of Major or Complex, with specific reasons supporting the request.

### **5. Intervention and Interveners' Direct Case.**

- a. Pursuant to M.G.L. c. 30A, section 10A, a group of ten citizens may intervene in a proceeding by filing and serving on all parties a Motion to Intervene within twenty-one days of the filing of the Appeal Notice. The Motion to Intervene shall provide the names, addresses, phone and fax numbers and email address of each of the members of the ten citizen group, and a certification under oath by each member that they consent to the Motion to Intervene, and authorize the group representative to act for the member. The Motion shall also designate a representative who shall represent the group and receive documents on its behalf. Upon filing a Motion in conformance with this paragraph, the ten citizen group shall be deemed a party, subject to disqualification if the Presiding Officer determines that the group does not consist of at least ten consenting citizens.
- b. A person who claims that he or she is substantially and specifically affected by the proceeding, may intervene by filing and serving on all parties a Motion to Intervene within twenty-one days of the filing of the Appeal Notice. The Motion must include a statement demonstrating that the moving party is substantially and specifically affected, in accordance with 310 CMR 1.01(7)(d). Upon filing a Motion in conformance with this paragraph, the moving party shall be deemed a party, subject to disqualification if the Presiding Officer determines that the moving party is not substantially and specifically affected.
- c. An intervenor that contests the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)(3) no later than the due date of Petitioner's Direct Case. An intervenor that supports the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)(4) no later than the due date of the Respondent's Direct Case.
- d. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)5. above, *sua sponte*, and provide a prompt ruling to the parties, or if in response to a motion within 10 days of the filing of such motion.

**6. Rebuttal.** The Petitioner or an Intervenor aligned with the Petitioner may file and serve on all parties rebuttal evidence no later than seven days after the filing of the Direct Case by the Respondent or any Intervenor aligned with the Respondent. The rebuttal evidence shall be limited to countering evidence submitted in a Respondent's or Intervenor's Direct Case in support of the Reviewable Decision.

## **7. Pre-Screening and Hearing.**

- a. Upon receipt of the Appeal Notice, the Presiding Officer will schedule a prescreening conference to be conducted pursuant to 310 CMR 1.01(5)(a)15, and will send notice to all parties. Such prescreening conference will presumptively occur not more than 30 days after the Appeal Notice is filed. As used in this regulation, "presumptively"

means that the time-line is binding, absent extraordinary circumstances in which case the Presiding Officer has authority to extend the time-line.

- b. Upon receipt of the Appeal Notice, the Department will schedule a hearing and will send notice to all parties. A hearing will be presumptively held within 120 days after the Appeal Notice is filed.
- c. Intervenors who subsequently intervene shall promptly receive the notice, but intervention shall not change the schedule of the pre-screening conference or the hearing.
- d. Parties may file motions regarding jurisdictional defects such as standing or timeliness by a date set by the presiding officer before the prescreening. Motions for directed verdict or summary decision may be filed by a date set by the presiding officer at the prescreening. Motions will not change the schedule of the prescreening conference or the hearing.
- e. Upon notice to the parties, the Presiding Officer may provide an opportunity for a simplified hearing conducted pursuant to 310 CMR 1.01(8)(a).
- f. If the Presiding Officer determines an appeal to be Major or Complex, she will adjust the schedule either by extending it up to 30 days, or by taking the matter ahead of other cases.
- g. All parties must attend and be prepared to discuss settlement and the narrowing of issues at the prescreening conference. At the conclusion of the prescreening conference or shortly thereafter, the Presiding Officer shall prepare and circulate a prescreening conference report, for any appeal not resolved in prescreening. The prescreening conference report shall contain a list of issues that are in dispute and which are legally relevant, and that are to be addressed in the parties' direct and rebuttal cases.
- h. The Presiding Officer shall conduct a hearing. At the hearing, the parties' Direct Cases shall consist of, and be limited to, the evidence contained in their respective Direct Cases and rebuttal evidence, subject to evidentiary rulings of the Presiding Officer. The primary function of the hearing shall be cross-examination of witnesses and, at the Presiding Officer's discretion, an oral closing argument. The hearing shall be limited to one day, unless the Presiding Officer finds that there is good cause for a longer hearing.

**8. Final Action.** The Presiding Officer shall issue a written recommended decision, not more than 30 days after the close of hearing that shall include findings on the contested issues. The Commissioner shall issue a final written decision consistent with 310 CMR 1.01(14)(b), presumptively within 6 months of the Reviewable Decision, or in the case of an appeal deemed Major or Complex in which the schedule was extended, within 7



months of the Reviewable Decision. Should a party request a tentative decision, the request shall be governed by 310 CMR 1.01(14)(a).

**9. Relationship to Other Rules of Adjudicatory Proceedings.**

- a. To the extent there is conflict between the regulations governing wetland appeals set forth in 310 CMR 10.04 and 310 CMR 10.05(7)(j), on the one hand, and the Rules of Adjudicatory Proceedings set forth in 310 CMR 1.01, on the other hand, the former shall prevail.
- b. The following regulations shall apply to wetland appeals: 310 CMR 1.01(1); 1.01(2); (3); (4); (5); 6(c), (f), (g), (h), (i), (j), (k); (8) (10); (11); 12(a), (c), (d); 13 (a), (b) (c), (e), (f), (g) (h), (j) (l), (m), (n); 14(b),(c), (d), (e), (f), (g); and 1.03.

**10. Effective Date.** The revised procedures for wetland appeals set forth in 310 CMR 10.04 and 310 CMR 10.05(7)(j) take effect on October 31, 2007 and shall apply to all wetland appeals for which a notice of claim is filed on or after October 31, 2007.

**Insert in 310 CMR 1.01(8) Additional Adjudication Procedures**

(d) Wetlands Permit Appeals. Appeals of Reviewable Decisions, as defined in 310 CMR 10.04, will be conducted in accordance with the provisions set forth in 310 CMR 10.05(7)(j).